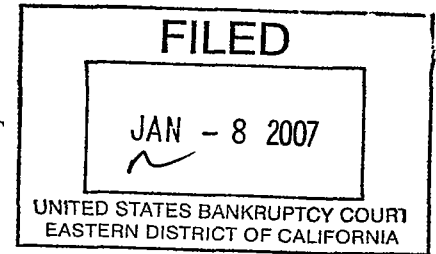


UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION



In re

Case No. 02-13531-B-7

Klara Jean Bergtholdt and  
Eric Douglas Williams,

Debtors.

James Salven, Chapter 7 Trustee,  
Plaintiff,

Adversary Proceeding No. 06-1185

DC No. SL-1

v.

Mitra Lyons,

Defendant.

**MEMORANDUM DECISION RE DEFENDANT'S MOTION FOR LEAVE TO  
FILE INTERLOCUTORY APPEAL**

The court has reviewed Defendant Mitra Lyons' ("Defendant") Motion for Leave to File Appeal, filed on December 19, 2006 (the "Motion"). Plaintiff James Salven, the Chapter 7 Trustee, responded on December 28, 2006 with an Objection to Reference of Motion for Leave to Appeal to the Bankruptcy Appellate Panel and Opposition to Defendant's Motion for Leave to Appeal (the "Trustee's Opposition"). For the reasons set forth below, the Motion will be denied.

**Findings of Fact**

This adversary proceeding was filed on June 13, 2006. On October 27, 2006, after a hearing, the court entered an order on Defendant's objection to jurisdiction and demand for a jury trial (the "Order"). The Order was interlocutory, i.e., it did not finally adjudicate the rights of the parties. Fifty-three (53) days later, the Defendant filed her Motion. The Defendant's pleadings in support of the Motion included a Motion for Leave to File Appeal, a Notice of Motion for Leave to File Appeal, a Declaration of Mitra

1 Lyons in Support of Motion for Leave to File Appeal, a Declaration of Scott Lyons in  
2 Support of Motion for Leave to File Appeal, a Memorandum of Points and Authorities in  
3 Support of the Motion for Leave to File Appeal, and a Proof of Service. Notably, the  
4 Defendant did not file a notice of appeal relating to the Order itself, neither did the  
5 Defendant pay the filing fee associated with an appeal.

6 **Conclusions of Law**

7 **Jurisdiction**

8 The district court and the bankruptcy appellate panel both have jurisdiction to hear  
9 appeals of interlocutory orders of the bankruptcy court. 28 U.S.C. 158(a)(3). It follows  
10 that the appellate court should also hear a motion for leave to appeal an interlocutory  
11 order. However, the appellate court does not acquire jurisdiction over a matter unless and  
12 until a notice of appeal is filed. Further, when the appeal is from an interlocutory order,  
13 the appellate court does not acquire exclusive appellate jurisdiction over that issue unless  
14 and until it grants leave to appeal the disputed order. Fed.R.Bankr.P. 8003; see also *In re*  
15 *Barker*, 306 B.R. 339, 345 (Bankr. E.D. Cal. 2004). Unless a notice of appeal is properly  
16 filed, the bankruptcy court's jurisdiction is not terminated simply because a party files a  
17 motion seeking leave to appeal an interlocutory order.

18 When a notice of appeal is filed, the clerk of the bankruptcy court docket the  
19 appeal and transmits the notice of appeal, together with any related motion for leave to  
20 appeal, to the clerk of the district court or the clerk of the bankruptcy appellate panel  
21 pursuant to Fed.R.Bankr.P. 8003(b). However, a notice of appeal has not been filed in  
22 this case. No appeal has been docketed and nothing has been transmitted to the appellate  
23 court. As a consequence, this court is the only court with jurisdiction to rule on the  
24 Motion.<sup>1</sup>

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25  
26 <sup>1</sup>The court notes that the Defendant has also filed a motion to withdraw the  
27 reference of this adversary proceeding. That motion is still pending in the district court.  
28 If the district court determines that the matter should not be litigated in the bankruptcy

1        **The Motion is Untimely**

2        As the Trustee's Opposition points out, the Defendant's Motion is procedurally  
 3 and fatally defective because she failed to file a timely notice of appeal.<sup>2</sup> Rule 8001(a)  
 4 provides, "An appeal from a judgment, order, or decree of a bankruptcy judge to a district  
 5 court or bankruptcy appellate panel . . . shall be taken by filing a notice of appeal with the  
 6 clerk within the time allowed by Rule 8002." Rule 8002 in turn provides, "The notice of  
 7 appeal shall be filed with the clerk *within 10 days* of the date of the entry of the judgment,  
 8 order, or decree appealed from." (Emphasis added.) Here, the time for filing a notice of  
 9 appeal of the Order expired on November 6, 2006, forty days (40) before the Defendant  
 10 filed her Motion.<sup>3</sup>

11        Arguably, the Defendant's Motion could be deemed to be a motion for an  
 12 extension of time to file the notice of appeal. However, that motion would also fail  
 13 because: (1) the Defendant failed to file a notice of appeal, and (2) the time limit for filing  
 14 a motion to extend time has also expired. Rule 8002(c)(2) provides, "A request to extend  
 15 the time for filing a notice of appeal must be made by written motion filed before the time  
 16 for filing a notice of appeal has expired, except that *such a motion filed not later than 20*  
 17 *days after the expiration of the time for filing a notice of appeal* may be granted upon a  
 18 showing of excusable neglect." (Emphasis added.) Here, the Defendant has not requested

19 \_\_\_\_\_  
 20 court for any reason including the right to a jury trial, then, it can remedy that issue by  
 21 withdrawing the reference. However, this court retains jurisdiction unless and until the  
 reference is actually withdrawn.


22        <sup>2</sup>On December 15, 2006, Defendant filed a Notice of Entry of Order stating that  
 23 the Order itself was "issued" on October 27, 2006. The time for appeal of a judgment or  
 24 order begins to run from the date of entry on the court's docket, not the date that a Notice  
 25 of Entry is filed. Fed.R.Bankr.P. 8002(a).

26        <sup>3</sup>Ordinarily, a timely filed motion for leave to appeal may be granted at the  
 27 discretion of the appellate court based on exceptional circumstances. *Mason v. Massie*,  
 28 335 B.R. 362, 368-69 (N.D. Ohio 2005). This court does not need to consider the merits  
 of such a motion if the underlying appeal itself was not timely perfected.

1 an extension of time by showing "excusable neglect" and the time for the Defendant to  
2 request an extension of time expired approximately twenty-three (23) days before the  
3 Defendant filed her Motion. The Defendant's failure to file a notice of appeal (timely or  
4 otherwise), and her failure to timely seek an extension of time, precludes the granting of  
5 relief as requested. Without a pending appeal, there is nothing for this court, or any other  
6 court, to approve.

7 Based on the foregoing, the Motion will be DENIED.  
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10 Dated: January 8, 2007  
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13 W. Richard Lee  
14 United States Bankruptcy Judge  
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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

David R. Jenkins  
PO Box 1406  
Fresno, CA 93716

James E. Salven  
PO Box 25970  
Fresno, CA 93729

Scott Lyons  
1010 W Main St  
Visalia, CA 93291

Klara Jean Bergtholdt  
3616 E OAK CT  
VISALIA, CA 93292

M. Nelson Enmark  
3447 W Shaw Ave  
Fresno, CA 93711

United States Trustees  
2500 Tulare St #1401  
Fresno CA 93721

DATED: 1-8-07

By:  \_\_\_\_\_

Deputy Clerk